SUPREME COURT, U. S.

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NO. 1015

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM C. WITHERSPOON,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,
Respondents.

BRIEF OF AMICUS CURIAE, OSCAR TURNER

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TO THE HONORABLE JUSTICES OF SAID COURT:

THE INTEREST OF THE AMICUS CURIAE, OSCAR TURNER

The Amicus Curiae, Oscar Turner is vitally interested in the case of Witherspoon vs. Illinois because a judgment favorable to the Petitioner Witherspoon will necessarily result in a reversal of the death penalty judgment which has heretofore been adjudged against the Amicus Curiae in the 54th District Court of McLennan County, Texas. Your Amicus Curiae was there convicted and adjudged the death penalty on January 24, 1968, as the result of a verdict

by a jury selected, over the Amicus Curiae's objections, by a selection procedure which eliminated as eligible jurors all veniremen expressing conscientious scruples against the imposition of the death penalty, in response to questions by State's counsel. The two deceased victims, and the two allegedly wounded by Turner at the same time, were white.

The Amicus Curiae, Oscar Turner, is a Negro, and he was convicted of the murder of two white men and assessed the death penalty by an all white jury, designedly selected by the State to eliminate from the trial jury all Negroes. The death penalty disqualification under the facts and circumstances of the jury's selection was a significant and decisive instrument in this design. This design, and the trial and judgment resulting from this design, violates the Defendant's rights under the Constitution of the United States, Fifth Amendment, Sixth Amendment and Fourteenth Amendment, in that he was denied due process of law, and denied the trial by a fair and impartial jury, was denied the equal protection of the laws, and suffered discrimination by reason of his color.

Clearly the Amicus Curiae's position is relevant to the disposition of the main cause. If, as the Amicus Curiae contends, disqualification of veniremen because of conscientious scruples against the death penalty is an instrument which tends to produce all white jurors, then there are compelling

constitutional reasons for removing this discriminatory instrument from the employment of the prosecution in the selection of trial juries.

THE ARGUMENT

Because the death penalty challenge for cause tends to disqualify a markedly disproportionate percentage of Negro veniremen, prosecution counsel are thereby afforded a most effective instrument to aid a design of producing all white juries to try Negro defendants in capital cases.

We submit that Negro veniremen are far more likely to be disqualified on the death penalty challenge than are white veniremen.

Academic documentation of this view is thus far apparently relatively meagre.

Robert F. Crosson's Doctorial Dissertation, "An Investigation into Certain Personality Variables Among Capital Trial Jurors",[1] did support this view, although with a sample so small as hardly to be conclusive on this point.

Dr. Hans Zeisel's Treatise, "Some Insights into the Operation of Criminal

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[1] Western Reserve University, approved January 1, 1966.

Juries",[2] based upon interviews with 1,248 jurors after their term of service concluded that ethnic background appeared to provide the greatest differentiation of all broad classification criteria in determining excuses of jurors, and that, within the ethnic classification, "Negro, Italian and Slavic backgrounds assure a preponderance of excuses by the prosecution".

A national poll of some ten years ago reflected 78 percent of Negroes favored abolition of the death penalty, as compared with 50 percent of the white persons polled expressing the same view.[3]

In 1965 a Texas poll indicated 59 percent of all adult citizens in cities greater than 50,000 population (which included Waco, Texas, where your Amicus Curiae, Oscar Turner, was convicted) favored abolishing the death penalty.[4]

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[2]Reproduced in the Appendix, pp. 21 ff. (especially p. 36) to Appellants' Opening Brief, People of the State of California vs. Donald Floyd Ketchel and Thomas Edward Sears, Criminal No. 10905, in the Supreme Court of California.

[3]Roper & Associates Release February 9, 1958.

[4]Belden & Associates Release July 8, 1965.

Surely it is reasonable to suppose that today the national percentage of Negroes favoring abolition of the death penalty is substantially more than the 78 percent reported in 1958.

The proceedings in the trial (and pre-trial) of your Amicus Curiae affords positive clinical support of our argument.[5]

The prosecution in Oscar Turner's trial deliberately and successfully designed that the determination of Turner's guilt or innocence, and his sentence, would be within the jurisdiction of an all white jury.

When the pre-trial sanity hearing was conducted, all of the prosecution's six peremptory challenges were exercised against Negro veniremen, and the resulting jury, which found Turner sane, was all white.

After Turner's Motion In Limine, which protested the employment of challenges for

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[5] The record has not yet been prepared in State of Texas vs. Oscar Turner, No. 16,057, in The 54th District Court of McLennan County, Texas. By Affidavit in the Appendix to this Brief, counsel has affirmed and detailed relevant proceedings in the trial of State vs. Turner.

cause based upon conscientious scruples against the death penalty, was overruled, a trial jury was selected.

Forty-three Negroes were on the venire, of whom 36 or approximately 83.7 percent were successfully challenged for cause by the prosecution because of conscientious scruples against the death penalty. (A., par. 4b.)

Of the 88 white persons on the venire, 33 or 37.5 percent were challenged for the same cause. (A., par. 4b, 4g.)[6]

There were 3 Negroes qualified on the death penalty, who were challenged for causes properly available only to the Defendant. (A., par. 4d)

Four peremptory challenges were employed to excuse the remaining otherwise qualified Negroes. (A., par. 4c.)

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[6] This dramatically disproportionate ratio of Negro aversion to the death penalty may be understandable in the light of the statistics (introduced into evidence by Turner upon his Motion In Limine) demonstrating that over the past 40 odd years some 58 percent of the persons received by the Texas Department of Corrections [sic] for execution were Negroes, and some 66 percent of those actually executed were Negroes.

This is not all.

After the petit jury was selected, Turner moved to quash this jury panel, upon the grounds, inter alia, that the prosecution had designedly selected an all white jury, that the prosecution had deliberately eliminated, either by challenges for cause appropriate only for the defense, or by peremptory challenges, Negroes otherwise qualified, not only upon the death penalty, but by intellect and belief in social order.

In the course of the hearing upon the motion, Turner's counsel invited the prosecution to put on evidence (or simply to make a statement of disavowal) refuting the defense contentions in its motion, including the further contention that the prosecution would not designedly select an all Negro jury to try a white defendant accused of murdering a Negro.

The trial judge then invited the prosecution to comment.

There was none.

Accordingly, the State not having met its burden thus established, the design to eliminate Negroes from this jury must be accepted as a fact. Labat vs. Bennett, 365 F.2d 698 (5 Cir. 1966).

Because the State of Texas vs. Turner is not now itself sub judice in this Court, the establishment of this design is presented for its clinical significance.

We submit that this clinically significant design, supporting the admittedly small academic concurrence, logically suggest that this design is a constant potential, inherently productive of violation of the constitutional safeguards of a trial by a fair and impartial jury, of due process of law, and of the equal protection of the laws.

Labat vs. Bennett, supra, reversed convictions of Negroes on the basis of systematic exclusion of Negroes from jury service. This conclusion rested upon the very considerable disparity between the percentage of Negroes in Orleans Parish with the percentage of Negroes on the petit jury venires.

The State in Labat undertook to rebut the prima facie case the Court held was thus established by showing that the disproportion between the races on the jury panel resulted primarily from the "benign practice of excusing from jury service 'outside' workers, manual laborers, and earners paid daily wages, most of whom are Negroes". (P. 719). The State contended that these persons were excused because service on a jury would subject them to undue hardship.

The Fifth Circuit rejected this explanation, holding that the exclusion of daily

wage earners as a class violated due process and equal protection rights to an impartial jury representing a cross-section of the community. The Court specifically held that the exclusion of this large class, wage earners, "discriminates against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of Negroes". (P. 720). The Court in Labat went still further and said that the State's explanation for the small number of Negro jurors actually gave "rise to an inference of 'purposeful discrimination' on the part of the jury selection officials, within the legal sense of these words". (P. 726).

Surely we do not ask of this Court too much to assume (especially should there not be persuasive rebuttal by the State of Illinois or her associate amici curiae) that the clinical observations of State of Texas vs. Turner are generally valid with reference to the highly disproportionate rate of Negroes who can in any case be eliminated by the prosecution from the trial jury through employing the death penalty disqualification.

This Court appeared in Swain vs. Alabama, 380 U.S. 202, 13 L. Ed.2d 759 (1965) to indicate that a defendant could establish purposeful discrimination by a prosecution without eliciting "an admission from the prosecutor that discrimination accounted for his rejection of Negroes". (380 U.S. 227, 13 L. Ed.2d 776).

Of course, we believe that the record

in the Turner case reflects at least the prosecution's tacit admission that this was his purpose.

This Court in Whitus vs. Georgia, 385 U.S. 545, 17 L. Ed.2d 599 (1967), found under the system of jury selection there involved that "the opportunity for discrimination was present" (385 U.S. 552, 17 L. Ed.2d 605).

The death penalty disqualification provides a very real opportunity for discrimination, because it inherently lends itself to prosecution design to secure all white juries in capital cases involving Negro defendants, just as the elimination of day laborers in Labat indirectly produced discrimination against Negroes as jurors.

Witherspoon argues, persuasively we believe, that elimination of jurors because of conscientious scruples against the death penalty results in juries which are not a fair cross-section of the community.

The clinical record in State vs. Turner emphasizes the validity of Witherspoon's contention, and then goes on, acting through the logic of Labat vs. Bennett, to suggest the additional constitutional affront of inherent racial discrimination through its employment by the prosecution, even if there be no design

APPENDIX TO BRIEF OF
AMICUS CURIAE, OSCAR TURNER

AFFIDAVIT OF COUNSEL
RESPECTING TRIAL RECORD

1. I am Charles E. Wallace, together with Joel W. Westbrook, counsel appointed by the Court for Oscar Turner both for the trial and the appeal. I was personally present throughout all proceedings had in connection with the trial, and am able to state the following of my own knowledge and belief, as recorded by me.

2. In the case of State of Texas against Oscar Turner two completely separate trials were held. The first trial was solely on the issue of sanity. The second trial was on the issue of sanity and guilt or innocence.

3. Pretrial Sanity Hearing.

The pre-trial sanity hearing in Texas was treated the same as a civil case. The State and the Defense had six peremptory strikes each. Consequently, a jury was selected from the first 24 persons on the jury list that were qualified and had not been struck for cause. There were six Negro veniremen in the first 24 in the Turner case. The Defense used its six peremptory strikes on white persons. The State used its six strikes on the six Negro veniremen and, consequently, a 12 member all white jury was formed.

4. Trial on the Merits.

(a) In a capital case in Texas, the State and Defense each have 15 peremptory strikes.

(b) In the Turner case, 131 prospective jurors were questioned. Of this number, 69 individuals expressed conscientious scruples against the death penalty and were therefore challenged for cause by the State. This eliminated 52.7 percent of the venire. Out of the 131 prospective jurors questioned, 43 of these were Negroes. Of the 43, only 7 stated that they did not have conscientious scruples against the death penalty. Thirty-six of the Negroes expressed conscientious scruples against the death penalty for a total of 83.7 percent of the Negro group.

(c) On the 7 Negroes who expressed themselves as having no conscientious scruples, the State used four of its peremptory challenges.

(d) The other three Negroes were challenged for cause by the State for the following reasons:

(1) The failure of the Defendant to testify would lead the prospective juror to believe that the Defendant was guilty;

(2) The prospective juror believed that this Defendant was guilty;

(3) The prospective juror stated that he already had an opinion formed that the Defendant was guilty.

(e) In each of these three cases, the Defense waived these challenges for cause, as allowed by Article 35.16, Section 11, Texas Code of Criminal Procedure, and the State nonetheless successfully sustained these challenges.

(f) The State used 13 peremptory challenges which was the same number used by the Defense. Of the 13 State peremptory challenges, four were Negro males, six white females, and three white males.

(g) The following chart reflects the breakdown of the jury venire and indicates not only the difference between the opinions of whites and Negroes, but also the difference of opinion between males and females.

Group	No Conscientious Scruples	Conscientious Scruples	Percentage having Conscientious Scruples
White Male	39	20	33.9%
White Female	16	13	44.8%
Negro Male	6	20	76.9%
Negro Female	1	16	94.1%
Whites	55	33	37.5%
Negroes	7	36	83.7%
Males	45	40	47.1%
Females	17	29	63.0%

5. The assertions in the Brief of your Amicus Curiae respecting procedural events during the course of the trial in State vs. Turner are true and correct.

CHARLES E. WALLACE
Court Appointed Counsel for Defendant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by the said Charles E. Wallace this day of , 1968.

Notary Public in and for McLennan County, Texas